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No. _____

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In The

Supreme Court of the United States

October Term, 1988

GREAT REPUBLIC INSURANCE COMPANY and GREAT REPUBLIC LIFE INSURANCE COMPANY,

Petitioners,

vs.

LaVERNE CHEVAL, By And Through Her Conservator, MARTIN MILLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Whether a punitive damage award violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution where there is no legislatively-prescribed maximum limit for punitive damages and where the instruction given the jury on punitive damages sets forth no meaningful standards for determining the amount of punitive damages.

2. Whether a punitive damage award rendered under the preponderance-of-the-evidence proof standard violates the Due Process Clause of the Fourteenth Amendment because punitive damages are penal in purpose and effect and due process requires proof beyond a reasonable doubt.

3. Whether a punitive damage award rendered under the preponderance-of-the-evidence proof standard violates the Due Process Clause of the Fourteenth Amendment because, even assuming arguendo punitive damages are not sufficiently penal in purpose and effect to require proof beyond a reasonable doubt, due process requires proof by clear and convincing evidence.

4. Whether the punitive damage award in this case is an excessive fine in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

LIST OF PARTIES AND RULE 28.1 LIST

In addition to the parties named in the caption to this petition, James W. Pritchett, Jr. was a named defendant in this action. He was dismissed before the matter went to trial and is not a party to this petition.

Pursuant to Rule 28.1 of the Rules of this Court, petititoners submit the following information: Petitioner Great Republic Insurance Company, a California corporation, is owned by petitioner Great Republic Life Insurance Company, a Washington corporation. Great Republic Life Insurance Company is owned by Empire Insurance Agency, Inc., a Washington corporation, which is owned by Patricia Pritchett, an individual residing in Washington state. Great Republic Insurance Company has a subsidiary, Allcare Home Health Services, Inc., a Washington corporation.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA FIRST APPELLATE DISTRICT

Petitioners Great Republic Insurance Company and Great Republic Life Insurance Company (hereinafter collectively referred to as "Great Republic" or "petitioner") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal entered in the above-entitled proceeding on January 5, 1989.

OPINIONS AND ORDERS BELOW

The January 5, 1989 opinion of the California Court of Appeal was ordered "not to be published" by that court. It is reproduced in the appendix hereto (hereinafter cited as "App."), A-4. The March 22, 1989 order of the Supreme Court of California denying Great Republic's petition for review is unreported and reproduced in App., A-19. The Court of Appeal's remittitur, issued on March 29, 1989, is reproduced in App., A-20. The Judgment in this action, entered on October 15, 1987, is unpublished and reproduced in App., A-1.

JURISDICTION

The January 5, 1989 decision of the California Court of Appeal rejected Great Republic's federal constitutional challenges to the punitive damage award in this case.[1] On

[1] Because the California Supreme Court has previously rejected constitutional attacks on punitive damages, *Hasson v.*

(Continued on following page)

March 22, 1989, the California Supreme Court declined to review these challenges to the jury's punitive award. This petition is filed within ninety days of the denial of the petition for review by the California Supreme Court. The questions presented are within this Court's jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides:

> [N]or shall any State deprive any person of . . . property, without due process of law. . . .

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Ford Motor Co., 32 Cal.3d 388, 402 n.2, 650 P.2d 1171, 185 Cal. Rptr. 654 (1982), *cert. dismissed*, 459 U.S. 1190 (1983); *Peterson v. Superior Court*, 31 Cal.3d 147, 160-161, 642 P.2d 1305, 185 Cal.Rptr. 784 (1982); *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal.3d 809, 819-820, 598 P.2d 452, 157 Cal.Rptr. 482, *appeal dismissed and cert. denied*, 445 U.S. 912 (1980); *Bertero v. National General Corp.*, 13 Cal.3d 43, 66 n.13, 529 P.2d 608, 118 Cal.Rptr. 184 (1974); *People v. Superior Court (Kaufman)*, 12 Cal.3d 421, 433, 525 P.2d 716, 115 Cal.Rptr. 812 (1974), under California law it actually was not necessary for Great Republic to raise the issue of the constitutionality of punitive damages in the California Court of Appeal in order to preserve the issue for review by the California Supreme Court. *See Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46 Cal.3d 287, 292, n.1, 758 P.2d 58, 250 Cal.Rptr. 116, *reh'g. den.* (1988) ("it was pointless for defendant to ask either the trial or appellate court to overrule one of our decisions").

2. The Excessive Fines Clause of the Eighth Amendment, which provides:

[N]or [shall] excessive fines [be] imposed. . . .

STATEMENT OF THE CASE

We raise the constitutionality of punitive damages in the context of a dispute between LaVerne Cheval and Great Republic Life Insurance Company over a skilled nursing home care insurance policy. Mrs. Cheval asserted she was entitled to policy benefits if she was in a skilled nursing home on her physician's recommendation. Great Republic asserted that if the care she actually was receiving was not "skilled nursing care," no coverage was provided by her policy.

The case went to trial and on August 3, 1987, the jury awarded plaintiff $32,200 on her breach of contract claim. While the jury found defendants had breached the implied covenant of good faith and fair dealing, no damages were awarded on that cause of action; the parties had stipulated during trial that if plaintiff prevailed on that claim, defendants would pay $8,050 in attorney's fees plaintiff incurred in recovering her policy benefits. The jury also awarded $500,000 in punitive damages.[2]

[2] In California, unlimited punitive damages are authorized by California Civil Code section 3294. At the time of trial, section 3294 authorized such damages where a preponderance of the evidence showed defendant had acted with oppression, fraud, or malice. Effective January 1, 1988, section 3294 was amended to require proof by "clear and convincing evidence," and to modify the definitions of malice and oppression. The

(Continued on following page)

Judgment was entered on October 15, 1987. Defendants' motion for new trial was denied and Great Republic appealed.

In its opening brief in the California Court of Appeal, Great Republic noted "the United States Supreme Court has taken up the issue of the constitutionality of punitive damages in the case of *Bankers Life and Casualty Co. v. Crenshaw,*" and urged the court to "await the United States Supreme Court's imminent ruling on the constitutional issues in *Bankers Life* before making a final decision herein, as the decision in *Bankers Life* may well have enormous implications on the issues in this case." See App., A-23. In her respondent's brief, Cheval opposed Great Republic's constitutional argument as being improperly raised for the first time on appeal.

In affirming the judgment in a January 5, 1989 unpublished opinion, the Court of Appeal addressed the constitutionality of punitive damages on the merits: "Defendants' attack on the constitutionality of punitive damages, raised for the first time on appeal, is without merit." App., A-18. The Court of Appeal cited *Toole v. Richardson-Merrell Inc.*, 251 Cal. App. 2d 689, 716-717, 60 Cal. Rptr. 398 (1967), which held that where punitive damages are awarded in a civil action, constitutional guarantees applicable to criminal proceedings are not controlling. App., A-18. Thus, the constitutionality of punitive damages was raised and passed on by the Court of Appeal.

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amendment has no application to this case. A copy of the enactment of section 3294 effective at the time of the trial herein is included in App., A-27.

On February 14, 1989, Great Republic filed a petition for review in the California Supreme Court, arguing the punitive damage award is void under both the California and United States Constitutions. With regard to the United States Constitution, Great Republic argued:

> 1. California Civil Code section 3294 is unconstitutionally vague on its face in violation of the Due Process Clause of the Fourteenth Amendment because (a) there is no legislatively-prescribed maximum limit for punitive damages, and (b) there are no meaningful standards for determining the amount of a punitive award;
>
> 2. Because punitive damages are punitive in purpose and effect, the defendant is entitled to the same procedural safeguards available in criminal cases, in particular, proof beyond a reasonable doubt;
>
> 3. Even assuming arguendo that punitive damages are not punitive in purpose or effect, due process requires proof by clear and convincing evidence; and
>
> 4. The punitive damage award in this case constitutes an excessive fine in violation of the Eighth and Fourteenth Amendments. App., A-25 - A-26.

Respondent contended, by way of letter to the California Supreme Court, that the constitutional arguments were untimely because not raised at the trial level, and that the constitutional issues had not actually been raised in the Court of Appeal.

The California Supreme Court denied the petition on March 22, 1989. App., A-19[3].

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[3] Pursuant to Supreme Court Rule 28.4(c), we observe that because this petition draws in question the constitutionality of

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REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION: THE DIMENSIONS OF THE PUNITIVE DAMAGE PROBLEM.

This Court has warned of the important constitutional concerns raised by punitive damages. In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828-829 (1986), the Court observed that the unrestricted imposition of punitive damages raises "important [constitutional] issues which, in an appropriate setting, must be resolved. . . ." In *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. ___, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988), the Court did not reach the appellant's constitutional arguments because they had not been raised and passed on in the state court. However, the majority opinion noted "the chief issue appellant would have us resolve – whether the Eighth Amendment's Excessive Fines Clause serves to limit punitive damages in state civil cases – is a question of some moment and difficulty. . . ." *Bankers Life*, 486 U.S. at ___, 108 S.Ct. at 1651, 100 L.Ed.2d at 73. And, in a concurring opinion joined by Justice Scalia, Justice O'Connor said:

> "Appellant has touched on a due process issue that I think is worthy of the Court's attention in an appropriate case. Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character

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California Civil Code section 3294, 28 U.S.C. § 2403(b) may be applicable, and the Attorney General of California will accordingly be served a copy of this petition.

of such awards, there is reason to think that this may violate the Due Process Clause." 486 U.S. at ___, 108 S.Ct at 1655, 100 L.Ed.2d at 78.

Most recently, on December 5, 1988, this Court granted certiorari to consider the Eighth Amendment excessive fine issue. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 845 F.2d 404 (2d Cir. 1988), *cert. granted*, ___ U.S. ___, 109 S.Ct. 527, 102 L.Ed.2d 529 (1988).

The Court's interest in the constitutionality of punitive damages comes none too soon. Punitive damages are an anomaly. They serve the same function as criminal penalties and are in effect private fines. *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1981); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting). Yet, unlike a criminal penalty, there is no statutorily-defined maximum and many of the procedural protections afforded a criminal defendant are absent. A corporate defendant, such as an insurance company, which cannot be imprisoned, frequently has much more to lose, but much less protection, when facing a claim for punitive damages.[4]

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[4] The majority of punitive damage awards are against businesses, not individuals. A recent RAND Corporation study of punitive damages, discussed *infra*, found that "[m]ost punitive damages awards in California were assessed against businesses, which constitute 57 percent of all defendants liable for punitive damages." Peterson, Sarma & Shanley, *Punitive Damages: Empirical Findings*, at viii (RAND Corp., Institute for Civil Justice, 1987) (hereinafter cited as RAND Study).

Until recent years the anomaly of punitive damages received little attention because "punitive damage awards occurred infrequently; their size, when they did occur, was relatively small; and, the cases in which they occurred involved, by and large, some of the most egregious forms of intentional torts." Ghiardi & Kircher, *Punitive Damages Law and Practice*, § 21.01, at 1 (1985). Now, however, all this has changed. A punitive monster is growing on the civil side, and reaching enormous proportions.

We have compiled statistics for punitive damage verdicts of $100,000 or more rendered by California juries during the ten-year period from January 1, 1976, through December 31, 1985, demonstrating the alarming trend in increased frequency and size of awards.[5] All told, during this ten-year period in California there were *109* punitive damage jury verdicts of *$1 million or more, 29* of *$5 million or more, 16* of *$10 million or more,* and *2* for *$125 million!* The verdicts rendered during just the last three years of the ten-year period accounted for 58 percent of the $1 million-plus verdicts.

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[5] The source for the statistics is Jury Verdicts Weekly, Inc., *Jury Verdicts Weekly,* which reports jury verdicts in all California state and federal courts. *Jury Verdicts Weekly* does not purport to be a complete listing of every verdict in California, but it is recognized as an authoritative source of information concerning verdicts. The RAND Corporation used *Jury Verdicts Weekly* as the data base for its study of California punitive damage jury verdicts during the period 1980-1984. RAND Study at 4.

If certiorari is granted, our brief on the merits will include an appendix with the names of all the cases included in our study, as well as the *Jury Verdicts Weekly* citation for each case.

The RAND Corporation's 1987 study of punitive damages[6] concluded two major changes have occurred in recent years. One, entirely consistent with the figures reported above, is: "The largest punitive damage awards have increased greatly in size, sharply increasing both the average award and the total dollars awarded." RAND Study at ix. The other, based on RAND's analysis of punitive awards by type of case, is: "[P]unitive damages in business/contract cases have become far more significant: Both routine and extraordinary awards were larger and given more frequently." *Id.*

The business/contract category in the RAND Study included bad faith claims against insurance companies, employers, and other businesses. *Id.*, at 8. The Study found:

> "In California, punitive damages for business/contract cases were led by awards in bad faith actions, which accounted for almost half of all dollars awarded as punitive damages in California between 1980 and 1984. Not only were growing numbers of damages awarded for bad faith, but those awards were much larger than in other business/contract cases." *Id.*, at vi.

Of the 109 cases discussed above where California juries awarded $1 million or more in punitive damages, 34 were insurance bad faith cases. Twelve of the 34 were punitive damage awards of *$5 million or more.*

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[6] The data for the RAND Study covered all civil jury trials in Cook County, Illinois, and San Francisco County, California, from 1960 to 1984, and all civil jury trials throughout California from 1980 to 1984. RAND Study, p. v.

The actions of California trial judges confirm that juries' punitive damage verdicts are frequently erroneous. Our study of punitive damage jury verdicts included obtaining the results of the new trial motions in the 109 cases discussed above where the verdict was $1 million or more. In 104 of the 109, the trial court ruled on a new trial motion. A new trial was granted or the punitive award was remitted in 46 cases, or 44 percent of the time. Over 50 percent of the combined total amount awarded by these 104 juries was eliminated by the trial judges. *The fact such a large percentage of punitive damages are remitted demonstrates current procedures are fundamentally flawed.*

One is hard pressed to devise a penalty more vague and destructive than California's punitive damage law. There is no essential difference between it and a criminal fine without an upper limit. We are confident this Court would not countenance a law imposing a limitless fine. Neither should the Court countenance this limitless punitive damage law under which juries have rendered such incredible verdicts.

To pass constitutional muster, the maximum amount of a punitive damage award must be delimited by the Legislature (just as it is in every other instance of fine or penalty known to law) and specific criteria for determining the amount of a punitive award must be prescribed. Until this is done, due process precludes any and all punitive damage awards in California. In addition, due process requires a higher burden of proof than "preponderance of the evidence" for punitive damages.

This Court currently has before it the question whether punitive damages are within the scope of the Excessive Fines Clause of the Eighth Amendment. We urge this Court to additionally resolve the more fundamental "institutional" due process problems, identified in

the present petition, which infect *every* punitive damage award in California and most other states – the absence of a legislative cap on punitive damages, the unconstitutionally vague "standard" juries use to determine the amount of a punitive award, and the inadequate burden of proof. These fundamental due process questions need to be resolved. A writ of certiorari should issue.

II.

CALIFORNIA CIVIL CODE SECTION 3294 IS UNCONSTITUTIONALLY VAGUE ON ITS FACE.

A. Due Process Requires That Section 3294 Be Sufficiently Definite To (1) Provide Adequate Notice Of The Penalty Which May Be Imposed And (2) Prevent Arbitrary And Discriminatory Enforcement. A High Standard Of Certainty Should Be Required.

To withstand a facial vagueness challenge under the Due Process Clause, a statute must (1) be sufficiently definite so as to provide adequate notice of the proscribed conduct, and (2) provide reasonably clear guidelines so as to prevent arbitrary and discriminatory enforcement. *See, e.g., Connelly v. General Const. Co.*, 269 U.S. 385, 391 (1926); *Colautti v. Franklin*, 439 U.S. 379, 390 (1979); *Smith v. Goguen*, 415 U.S. 566, 572 n.8 (1974); *see also Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984), and cases cited therein.

Vagueness doctrine has application to standards for determining a penalty as well as liability. *United States v. Batchelder*, 442 U.S. 114, 123 (1979) ("So too, vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences

of violating a given criminal statute"); *Bankers Life*, 486 U.S. ___, 108 S.Ct. at 1656, 100 L.Ed.2d at 78 (O'Connor, J., concurring). Vagueness doctrine applies to civil as well as criminal penalties. *Connelly v. General Constr. Co.*, 269 U.S. at 391; *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966). However, "where a statute imposes criminal penalties, the standard of certainty is higher." *Kolender v. Lawson*, 461 U.S. 352, 359 n. 8 (1983).

In part III of this petition, *infra*, we will demonstrate that punitive damages in California are tantamount to a criminal penalty under this Court's test for distinguishing criminal from civil penalties. Nevertheless, even if punitive damages properly could be considered a remedial civil sanction (they cannot), the present reality of enormous awards – far in excess of any fine which can be levied under existing criminal laws – means a high standard of certainty should be required.

A high standard of certainty also should be required because punitive damages are particularly susceptible to the vice of arbitrary and discriminatory enforcement. This Court has recognized as much: "[I]t cannot be ignored that punitive damages may be employed to punish unpopular defendants." *International Bhd. of Elec. Workers v. Foust*, 442 U.S. at 50 n. 14.

The "unpopular defendants" are usually those with wealth, primarily corporations, frequently insurance companies. The inherent prejudices jurors have against large and wealthy corporate defendants, particularly insurance companies, cannot be gainsaid. *See* Morris, *Punitive Damages in Tort Cases*, 44 Harv.L.Rev. 1173, 1191 (1931) ("It is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare"); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective*

Products, 49 U.Chi.L.Rev. 1, 11 (1982); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 So.Cal.L.Rev. 1, 42-43, 52-53 (1982). The particular need for specific standards to guide jury discretion in order to prevent punitive awards which are arbitrary and discriminatory in amount is apparent.

B. Section 3294 Is Unconstitutionally Vague

Section 3294 does not prescribe a maximum limit for punitive damages. This in and of itself should render the statute unconstitutional on its face, both for failure to provide adequate notice of the penalty which may be imposed and for impermissible delegation of a basic policy matter to juries and judges for resolution on an ad hoc and subjective basis.

In her concurring opinion in *Bankers Life & Casualty v. Crenshaw*, 486 U.S. ___, 108 S.Ct. 1645, 100 L.Ed.2d. 62, Justice O'Connor observed:

> "Under Mississippi law, . . . the amount of the penalty that may ensue is left completely indeterminate. As the Mississippi Supreme Court said, 'the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury.' [Citation.] This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process. The Court has recognized that 'vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.' [Citation.] Nothing in Mississippi law warned appellant that by committing a tort that caused $20,000 of actual damages, it could expect to incur a $1.6 million punitive damage award." 468 U.S. at ___, 108 S.Ct. at 1655-1656, 100 L.Ed. 2d at 78-79.

Similarly, nothing in section 3294 warned Great Republic that by committing a breach of contract that caused $32,200 in actual damages and a tort that caused $8,050 of actual damages, it could expect to incur a $500,000 punitive damage award.

At the very least, due process must require *the Legislature* to set the outer limit for a penalty. A certain degree of risk of arbitrary and discriminatory enforcement is inherent in every penalty. It is the Legislature's job to make the basic policy decision where that risk should end. The Legislature has not done so for punitive damages, and until it does, *every* punitive damage award in California violates due process.

The California Supreme Court has attempted on a case-by-case basis to fill in the gap left by the Legislature: a punitive award is excessive if " 'the entire record, when viewed most favorably to the judgment, indicates [the award was] rendered as the result of passion and prejudice.' " *Neal v. Farmers Ins. Exh.*, 21 Cal.3d 910, 927, 582 P.2d 980, 148 Cal.Rptr. 389 (1978). The three factors the California Supreme Court has said are relevant to this determination, *id.*, at 928, have been turned into a standard jury instruction, BAJI No. 14.71 (7th ed. 1986),[7] given in the instant case, which provides in pertinent part:

> "The law provides *no fixed standards* as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.
>
> "In arriving at any award of punitive damages, you are to consider the following: (1) The reprehensibility of the conduct of the defendant, (2) The amount of

[7] "BAJI" is the *Book Of Approved Jury Instructions.*

> punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition, (3) That the punitive damages must bear a reasonable relation to the actual damages." (Emphasis added.)

Even assuming the Legislature's failure to prescribe a maximum limit for punitive damages is not fatal, the California Supreme Court's "passion and prejudice" test and the three factors listed in BAJI No. 14.71 do not save section 3294.

1. The three factors listed in BAJI No. 14.71, taken directly from *Neal,* are inherently suspect. The factors a reviewing court considers are tailored to *its* function – to ascertain whether the amount of an award exceeds the bounds of reason. *See Neal,* 21 Cal.3d at 927-928. This does not mean these factors are sufficiently precise to govern the jury's determination of the award in the first instance. The jury's function is to come up with a reasonable award, not to define the outer limits of reasonableness.

Our point is made by the 1988 Revision to BAJI No. 14.71, which permits the third *Neal* factor – reasonable relation to actual damages – to be deleted from the jury instruction on punitive damages. The BAJI Committee, which drafts California's standard jury instructions, explained: "The general rule that there must be a reasonable relationship between actual and punitive damages is stated in cases where the appellate court is reviewing the trial court's ruling on a post trial motion or the verdict itself and not in the context of how the jury should be instructed." BAJI No. 14.71 (7th ed. 1988 pocket pt.) Use

Note. Of course, the same can be said for the other two factors.

2. The inadequacy of the "reprehensibility" factor to guide the jury is demonstrated by *Giaccio v. Pennsylvania*, 382 U.S. 399, where this Court said:

> "It would be difficult if not impossible for a person to prepare a defense against such general abstract charges as 'misconduct,' or 'reprehensible conduct.' If used in a *statute* which imposed forfeitures, punishments or judgments for costs, such loose and unlimiting terms would certainly cause the statute to fail to measure up to the requirements of the Due Process Clause." *Id.*, at 404, emphasis in original.

3. The "wealth of the defendant" factor is anomalous in that there is no requirement that the plaintiff even present evidence of the defendant's wealth. E.g., *Vossler v. Richards Mfg. Co.*, 143 Cal.App.3d 952, 961-965, 192 Cal.Rptr. 219 (1983). Where evidence of wealth is presented, it may provide some guidance in setting an amount sufficient to punish and deter when the defendant is an individual of normal means or a small business. But it becomes less and less meaningful as wealth increases, to the point of providing no guidance whatsoever when a multi-million or multi-billion dollar corporation is involved. The vagueness of this factor where corporations are concerned means it is of little or no use when it is needed the most.

4. The "reasonable relation to actual damages" factor is as meaningless as the other two.[8] California law

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[8] As noted above, the BAJI Committee recently decided this factor need not be included in the punitive damage jury instruction.

does not even require that there *be* an award of actual damages in order to sustain a punitive award. *E.g., All-West Design, Inc. v. Boozer,* 183 Cal.App.3d 1212, 1222-1223, 228 Cal.Rptr. 736 (1986); *Carr v. Progressive Casualty Ins. Co.,* 152 Cal.App.3d 881, 892, 199 Cal.Rptr. 835 (1984). Where actual damages are awarded, the jury has no way of knowing what a "reasonable relation" is in any given case. In other contexts, the use of "reasonable" as a measure is related to the common experience of the juror; e.g., when used to define negligence. In this setting, however, there is nothing in the common experience of a juror which sheds light on whether one amount of punitive damages is more reasonably related to actual damages than another. The jury is left to speculate.

Moreover, to say a punitive award must bear a reasonable relation to actual damage on the heels of having said the jury should consider the defendant's wealth creates a direct conflict. "[O]ne rule requires the proportioning of the punitive award to the compensation granted, while the other requires the proportioning of the award to the defendant's ability to pay it." Dobbs, *Handbook on the Law of Remedies* § 3.9, at 210-211 (1973).

The lack of any meaningful guidance from this factor is borne out by the inconsistent manner in which the appellate courts use it to determine whether an award of punitive damages is excessive. In almost every California appellate opinion discussing the issue it is emphasized that there is "no fixed ratio" between the award of punitive and compensatory damages. *E.g.,* App., A-17; *Liodas v. Sahadi,* 19 Cal.3d 278, 284, 562 P.2d 316, 137 Cal.Rptr. 635 (1977); *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co.,* 189 Cal.App.3d 1072, 1097, 234 Cal.Rptr. 835

(1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2023, 100 L.Ed.2d 610 (1988); *Betts v. Allstate Ins. Co.*, 154 Cal.App.3d 688, 711-712, 201 Cal.Rptr. 528 (1984). In other words, if the appellate court believes the jury's punitive award is warranted by the facts it will affirm, and if not it will reverse, regardless of the ratio of punitive to compensatory damages. See Prosser & Keeton, *The Law of Torts* § 2, at 14-15 (5th ed. 1984); Dobbs, *Handbook on the Law of Remedies, supra*, at 211; Ellis, *Fairness and Efficiency in the Law of Punitive Damages, supra*, 56 So.Cal.L.Rev. at 60 (reasonable relation principle "serves to disguise the bases on which decisions by reviewing courts are reached.")[9]

This case-by-case determination of the proportionality between the award of compensatory and punitive damages is purely subjective and provides no fixed, objective criterion for the jury to use to determine what is proportionate in any given case. It adds no precision whatsoever to the "standard" for determining the appropriate amount of a punitive damage award. *See* Dobbs, *Handbook of the Law of Remedies, supra*, at 211 ("Since no precise ratio is ever required, the rule is not really a rule at all, but only a general idea. It encourages an inflexible posture without adding any commensurate certainty in

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[9] If certiorari is granted, our brief on the merits will include a comparison of the ratio of punitive to compensatory damages in numerous California appellate decisions affirming or reversing punitive awards. Space considerations prevent us from doing so here. Suffice it to say we can find a case reversing and a case affirming for just about every ratio category.

the law. It probably doesn't do much harm, but it is difficult to see that it does any good at all").

It is undeniable that the "no fixed standards" standard of BAJI No. 14.71 with its three meaningless factors permits the jury to determine the amount of a punitive award without essential guidance. This lack of guidance renders punitive damage verdicts wholly unpredictable and explains the incredible amounts juries are awarding with ever-increasing frequency. The "standard" given a California jury to determine the amount of a punitive damage award is unconstitutionally vague.

The availability of judicial review of a jury's punitive award for excessiveness does not remedy the unconstitutional vagueness of the "standard" the jury uses in the first instance. Trial and appellate judges, operating under the same "no fixed standards" standard as juries, decide whether to substitute their unguided discretion for the juries'.[10] *This post-award, case-by-case review without modification of the "standard" itself does not cure its imprecision.* To place primary reliance on judicial correction of frequently errant jury verdicts is to effectively deprive defendants of their constitutional right to trial by a *jury* operating under explicit standards. Relying on case-by-case review by *appellate* courts as a remedy for vagueness is especially unfair. It means the defendant necessarily

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[10] The Court of Appeal in the instant case acknowledged "there is no precise ratio between [punitive] damages and net worth or net income which represents the only correct formula for an award" and "courts have upheld awards with ratios [between punitive and compensatory damages] ranging from 1:1 to 2,000:1." App., A-16, A-17.

must incur the expense of prosecuting an appeal.[11] Case-by-case judicial review for excessiveness is no substitute for a precise standard in the first instance. *Cf. Santosky v. Kramer,* 455 U.S. 745, 757 (1982) ("Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard").

California's punitive damage law cannot withstand a forthright vagueness analysis, which is long overdue. Certiorari should be granted.

III.

PUNITIVE DAMAGES ARE PUNITIVE IN PURPOSE AND EFFECT; ACCORDINGLY, THE DEFENDANT IS ENTITLED TO THE SAME PROCEDURAL SAFEGUARDS AVAILABLE IN CRIMINAL CASES, IN PARTICULAR, PROOF BEYOND A REASONABLE DOUBT.

A. If A Sanction Is Penal In Purpose Or Effect, The Procedural Safeguards Available In Criminal Cases Apply.

When a state sanctions a defendant "for the purpose of punishment" rather than as "an incident of some other legitimate governmental purpose," *Bell v. Wolfish,* 441 U.S. 520, 538 (1979), i.e., unless the penalty is a "remedial civil sanction," *United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 362, 366 (1984), due process requires

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[11] This includes the cost of posting a bond for one and one-half times the amount of the judgment in order to obtain a stay of execution on appeal. Cal. Code Civ. Proc. § 917.1 (West 1985). Considering the number of million-dollar plus punitive awards, discussed *supra,* this is a very significant factor.

the procedural protections and restrictions available in criminal proceedings. *United States v. Ward*, 448 U.S. 242, 248-249, *reh'g denied*, 448 U.S. 916 (1980); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167 (1963). This is true even when the penalty takes the form of an economic sanction. *United States v. Ward*, 448 U.S. at 245-251. So long as it is designed primarily to punish, a fine or other economic sanction may not be imposed without according the defendant the procedural safeguards available in criminal cases. *Id.* at 248-251.

Whether a penalty imposed by statute is criminal or civil (i.e., whether it is primarily designed to punish or to serve a remedial purpose) is a matter of both legislative intent and statutory purpose or effect. As explained in *United States v. Ward*, 448 U.S. at 248-249:

> "Our inquiry . . . [into whether a penalty is civil or criminal] has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. [Citation.] Second, where Congress had indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was *so punitive either in purpose or effect* as to negate that intention. [Citation.] In regard to this latter inquiry, we have noted that 'only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground.' " (Emphasis added.)

Accord, Allen v. Illinois, 478 U.S. 364, 368-369 (1986); *United States v. One Assortment of 89 Firearms*, 465 U.S. at 362-363.

With regard to the first of these two inquiries, 100 years ago the California Supreme Court applied the "civil" label to punitive damages, *St. Ores v. McGlashen*, 74 Cal. 148, 149, 15 P. 452 (1887), and the label has, thus far, stuck. *See Peterson v. Superior Court*, 31 Cal.3d at 161, 642 P.2d 1305, 185 Cal.Rptr. 784. California Civil Code section 3294 is a codification of common law principles. *Bertero v. National General Corp.*, 13 Cal.3d 43, 66, n.13, 529 P.2d 608, 118 Cal.Rptr. 184. There being no indication to the contrary, it is reasonable to conclude the California Legislature, in codifying the common law of punitive damages in the Civil Code, impliedly indicated a preference for the "civil" label used by the courts.

The key question, then, is whether punitive damages in California are "so punitive in purpose or effect" as to negate the Legislature's implied intention to establish a civil penalty.

B. Punitive Damages Are Penal In Purpose.

Unquestionably, punitive damages in California are punitive in purpose, despite the Legislature's apparent intent to apply a "civil" label. The statute itself, section 3294, makes this crystal clear. By its very terms punitive damages are recoverable under specified circumstances "for the sake of *example* and by way of *punishing* the defendant." (Emphasis added.)

This statement of purpose is entirely consistent with the case law, which explains the purpose of punitive damages is to *punish* and *deter*. *E.g., Dyna-Med, Inc. v. Fair Employment & Hous. Com.*, 43 Cal.3d 1379, 1387, 743 P.2d 1323, 241 Cal.Rptr. 67 (1987) ("Punitive damages . . . are

neither equitable nor corrective; punitive damages serve but one purpose – to punish and through punishment, to deter"); *Neal v. Farmers Ins. Exchange*, 21 Cal.3d at 928 n.13; *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981); *International Bhd. of Elec. Workers v. Foust*, 442 U.S. at 48; *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350; *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 82 (Marshall, J., dissenting) ("they serve the same function as criminal penalties and are in effect private fines").

As this Court recognized in *Bell v. Wolfish*, 441 U.S. at 539 n. 20: "Retribution and deterrence are *not* legitimate nonpunitive governmental objectives." (Emphasis added.) Accordingly, to borrow the Court's language in *Kennedy v. Mendoza-Martinez*, 372 U.S. at 167 (divestiture of citizenship for leaving the United States to avoid the military draft is punishment): "If the sanction . . . is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further."

C. Punitive Damages Are Penal In Effect.

Even if the punitive purpose of punitive damages were not so obvious, under *United States v. Ward* consideration must be given to punitive effect. In examining this issue we "refer to the seven considerations listed in Kennedy v. Mendoza-Martinez. . . ." *United States v. Ward*, 448 U.S. at 249; *accord, United States v. One Assortment of 89 Firearms*, 465 U.S. at 365. In *Kennedy*, the Court set forth the following factors relevant to determining whether a sanction is penal or regulatory in effect:

> "[1] [w]hether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment – retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned. . . ." *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168, 169, footnotes omitted.

Space considerations preclude us from considering each of these criteria here.[12] If a writ of certiorari is granted, our brief on the merits will demonstrate that the *Kennedy* criteria strongly point to punitive damages in California being penal rather than merely remedial in effect.

In sum, punitive damages in California are penal in both pupose and effect. When the civil law inflicts punishment through punitive damages it acts as the surrogate of the criminal law. Accordingly, a defendant facing punitive damages should be entitled to the same constitutional safeguards as a defendant in a criminal proceeding,

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[12] In Grass, *The Penal Dimensions of Punitive Damages*, 12 Hastings Const.L.Q. 241 (1985), the seven *Kennedy* criteria are exhaustively analyzed in the context of punitive damages. The author concludes: "Punitive damages occupy a unique position in American jurisprudence, a punishment mechanism properly belonging to, but nevertheless evading, the criminal justice system." *Id.* at 241. "When the punitive damages concept is analyzed . . . the conclusion is inescapable that they are penal in nature, spirit, and jurisprudence, and thus mandate higher standards of procedural protection." *Id.* at 247.

including proof beyond a reasonable doubt.[13] *See In re Winship*, 397 U.S. 358, 364 (1970). Great Republic was denied these safeguards. Certiorari should be granted.

IV.

ASSUMING ARGUENDO THAT PUNITIVE DAMAGES ARE NOT PUNITIVE IN PURPOSE OR EFFECT (THEY CLEARLY ARE), DUE PROCESS REQUIRES PROOF BY CLEAR AND CONVINCING EVIDENCE.

"The Court traditionally has held that the Due Process Clauses protect civil litigants who seek recourse in the courts . . . as defendants hoping to protect their property. . . ." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

In *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976), the Court stated the test for determining what process is due:

> "[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

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[13] The issue of punitive damages was submitted to the jury in the instant case under the preponderance-of-the-evidence proof standard.

The *Mathews* factors have been used by the Court to determine that due process requires proof by clear and convincing evidence in particular circumstances. *Santosky v. Kramer*, 455 U.S. 745 (extinguish parent-child relationship); *Addington v. Texas*, 441 U.S. 418 (1979) (involuntary commitment to mental hospital).

Again, space considerations do not permit us to fully analyze the three *Mathews* factors here.[14] If certiorari is granted, we will do so in our brief on the merits. There are a few important points which need to be made now, however.

1. Our contention that due process requires "clear and convincing evidence" for a punitive damage award cannot be discounted merely because a monetary interest also is at stake rather than the exclusively nonmonetary interests involved in the two burden-of-proof cases cited above. The monetary interest when a defendant in a California court, especially a corporate defendant, faces a claim for punitive damages is wholly different from any other monetary interest known to law. The ever-increasing odds in favor of a punitive award, the *staggering* sums being awarded, and the noninsurability of such awards, *see Peterson v. Superior Court*, 31 Cal.3d at 159, 642 P.2d 1305, 185 Cal.Rptr. 784, make this situation far more serious from a defendant's perspective and require a

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[14] Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va.L.Rev. 269 (1983), thoroughly discusses the *Mathews* test in the context of punitive damages and concludes: "[P]unitive damages defendants are entitled to . . . proof by clear and convincing evidence as to the substantive basis for a punitive damages award. . . ." *Id.* at 351.

higher burden than the same standard of proof applicable to run-of-the-mill automobile negligence actions.

2. Two factors considered by the Court in *Santosky v. Kramer*, 455 U.S. 745, as magnifying the risk of erroneous fact-finding are directly relevant to punitive damages: "imprecise substantive standards that leave determinations unusually open to the subjective values" of the fact finder, *id.* at 762, and "proceedings . . . often vulnerable to judgments based on cultural or class bias," *id.* at 763. We discuss these considerations in detail in part II, *supra*.

3. In addition to the magnified risk of an erroneous jury verdict where punitive damages are concerned, the relative harm suffered by the plaintiff and the defendant when error occurs must be considered. *See Santosky v. Kramer*, 455 U.S. at 765-766. This consideration is *overwhelming* where punitive damages are concerned. Since punitive damages are not intended to compensate the plaintiff for any loss, they constitute a windfall. *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting). An erroneous failure to award punitive damages is therefore of no legitimate significance to the plaintiff. In contrast, the defendant has very real and substantial interests at stake, i.e., the potentially enormous economic impact of an erroneous punitive award and the associated stigma. The preponderance-of-the-evidence standard, which allocates the risk of error nearly equally between those two outcomes, most certainly does not reflect their relative severity.

4. At least four state supreme courts have held that punitive damages must be proved by clear and convincing evidence. See *Linthicum v. Nationwide Ins. Co.*, 150 Ariz. 326, 723 P.2d 675, 680-681 (1986); *Tuttle v. Raymond*, 494 A.2d 1353, 1363 (Me. 1985); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 362-363 (Ind. 1982); *Wangen v. Ford Motor Co.*, 97 Wis. 260, 294 N.W.2d 437, 457-458 (1980).

In sum, even assuming arguendo that the highest standard of proof is not required (it is), due process requires at the very least that the clear-and-convincing-evidence standard be applied. It was not in the instant case. A writ of certiorari should issue.

V.

THE PUNITIVE AWARD IN THIS CASE IS AN EXCESSIVE FINE WITHIN THE MEANING OF THE EIGHTH AMENDMENT.

This Court already has before it the question whether a punitive damage award violates the Excessive Fines Clause of the Eighth Amendment. *Browning-Ferris Industries v. Kelco Disposal, Inc., cert. granted*, ___ U.S. ___, 109 S.Ct. 527, 102 L.Ed.2d. 529. Therefore, it is not necessary to convince the Court that the excessive fines issue is worthy of its consideration.[15]

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[15] Great Republic requests, in accordance with established procedure, Stern, Gressman & Shapiro, *Supreme Court Practice* § 5.9, p. 274 (6th ed. 1986), that this Court at least hold Great Republic's petition until a decision is reached in *Browning-Ferris*, argued on April 18, 1989. Of course, to the extent the Court is inclined to grant certiorari on the due process issues, such deferral would be unnecessary.

We do make one observation: at first blush the excessive fines issue appears to involve only the question whether judicial review of a jury's punitive award for excessiveness is constitutionally required and, if so, how to determine if a punitive award is constitutionally excessive. However, the California Legislature's failure to prescribe a maximum limit for punitive damages, which we discuss in part II, *supra*, as a matter of due process, also can be viewed as an excessive fines issue. A statutory fine without limit should be considered a per se violation of the Eighth Amendment.

CONCLUSION

We submit the time has come for this Court to tackle the serious due process issues posed by California's, and most other states', punitive damage law. We can think of few issues in the civil arena which are as momentous in their scope and significance. We urge that a writ of certiorari be granted.

Respectfully submitted,

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

LAVERNE CHEVAL, by and through her conservator, MARTIN MILLER, Plaintiff, vs. GREAT REPUBLIC INSURANCE COMPANY, a California corporation, GREAT REPUBLIC LIFE INSURANCE COMPANY, a Washington corporation, JAMES W. PRITCHETT, JR., and Does 1-20, inclusive, Defendants.	NO. 619 397 1 JUDGMENT ON VERDICT

(Filed Oct 14, 1987)

This action came on regularly for trial on July 27, 1987. Arnold Levinson and Robert Derham appeared as attorneys for plaintiff Laverne Cheval and Harvey Goldhammer appeared as attorney for defendants Great

Republic Insurance Company and Great Republic Life Insurance Company.

A jury of 12 persons was regularly impaneled and sworn to try the action. Witnesses for both plaintiff and defendant were sworn and examined. After hearing the evidence, arguments of attorneys, and instructions of the Court, the jury members retired to consider their verdict, and subsequently returned into court, and being called, answered to their names and rendered their verdict as follows:

The jury found that defendants breached their contract with plaintiff and awarded damages in the amount of $32,200;

The jury found that defendants breached the implied covenant of good faith and fair dealing;

The jury found that defendants acted with malice, fraud, or oppression, and awarded punitive damages in the amount of $500,000.

In addition to the damages awarded by the jury, the plaintiff and defendants stipulated during trial that if the jury found in favor of the plaintiff on the action for breach of the implied covenant of good faith and fair dealing, defendants would pay the reasonable amount of attorney's fees necessarily incurred by plaintiff in order to recover the benefits owed to her under the insurance policy. The parties also stipulated that these attorney's fees are in the amount of $8,050.

In addition, on August 11, 1987, plaintiff filed a cost bill in the amount of $5,075.88. Defendants have not

objected to the plaintiff's cost bill and the time for filing a motion to tax costs has expired.

In addition, interest shall run from date of entry of verdict, August 4, 1987, at the legal rate.

IT IS ADJUDGED that plaintiff recover from defendants Great Republic Insurance Company and Great Republic Life Insurance Company, the total sum of $545,325.88.

DATE: OCT 14 1987 /s/ Winston McKibben
JUDGE OF THE SUPERIOR COURT

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

LA VERN CHEVAL, an Incompetent Person, etc.,
Plaintiff and Respondent,
v.
GREAT REPUBLIC INSURANCE COMPANY et al.,
Defendants and Appellants.
_____/

A040344
(Super. Ct. No. 619397-1 Alameda County)

(Filed Jan. 5, 1989)

Defendants Great Republic Insurance Company and Great Republic Life Insurance Company appeal from a judgment entered upon a jury verdict awarding plaintiff La Vern Cheval compensatory damages of $32,200 and punitive damages of $500,000 in her action for breach of contract and breech of the implied covenant of good faith and fair dealing.[1] Defendants contend: (1) the court erroneously refused their special jury instructions on breach of the implied covenant and punitive damages; (2) there was no substantial evidence defendants acted with fraud or malice toward plaintiff; (3) plaintiff's evidence on defendants' net worth and income should not have been

[1] Pursuant to a stipulation of the parties, the judgment also awarded plaintiff $8,050 in attorney's fees.

admitted; and (4) the amount of punitive damages was excessive as a matter of law. We affirm the judgment.

FACTS

In 1982, when plaintiff was 87 years old, she bought a skilled nursing home care insurance policy from defendants' agent, Martin Miller.[2] Under the policy, benefits of $20 a day for 100 days, and $40 a day for the next 995 days were payable if the insured, as a result of injury or sickness, was "necessarily and continuously confined in a Skilled Nursing Home Facility, on the advice of the physician that skilled and continuous nursing care is required. . . ." Benefits were also payable for private duty nursing if immediately following a period of hospitalization, the insured was "house confined and require[d] the services of a nurse at the recommendation of and with the approval of a physician, . . . " The policy defined a "Skilled Nursing Home Facility" as an institution operating according to law and regularly engaged in providing continuous skilled nursing care, but did not define skilled nursing care.

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[2] Defendant Great Republic Life Insurance Company is a Washington corporation which owns Great Republic Insurance Company, a California corporation. The California company issued the policy to plaintiff; the Washington company administered policy claims. Plaintiff's theory at trial was that both were subject to liability because of their close relationship. As do the parties, we refer to both companies collectively as Great Republic or defendants unless it is necessary to distinguish them.

Plaintiff, who is legally blind and deaf, and who had diabetes and heart disease, suffered a stroke in February 1983 and was hospitalized for 10 days. Upon her release from the hospital, her physician, Jean Sharp, M.D., recommended home care by a private duty nurse. Miller began to assist plaintiff in submitting claims for benefits under her policy, as she was unable to do so herself.

Initially plaintiff's claim for private duty nurse benefits was rejected because her nurse was unlicensed. Miller helped plaintiff find a licensed nurse and defendants began paying benefits. In November 1984, plaintiff was notified that her benefits would stop because she had been going out to church, prayer meetings, luncheons, and to the hairdresser and was thus no longer "house confined." Miller protested that denial was inconsistent with the policy, which defined "House Confinement" as the insured's "inability to resume . . . normal functions."

In early January 1985, defendants denied benefits for the private duty nursing on the ground that plaintiff's care was custodial, not skilled. Miller again protested the denial. Dr. James Pritchett, son of one of defendants' owners, reviewed the file and concluded that plaintiff's care was skilled. The physician wrote, "I have seen this file below and suspect there is little that can be done to dispute the documentation in the chart by Dr. Sharp. The agent Miller is behaving unreasonably and please forward a copy of his letter to Bill Pritchett as I believe the company may wish to terminate him." Eventually all the private duty nursing benefits owed plaintiff were paid.

In the meantime, in December 1984 plaintiff broke her hip and was hospitalized again for surgery, which

included placement of a prosthesis in her hip. After her release from the hospital in January 1985, Dr. Sharp placed her in Hillhaven Alameda, a skilled nursing facility. At that time plaintiff's diabetic condition required close supervision by the nursing staff, a special diet, and an injection of two types of insulin each morning. California law requires administration of such medication by licensed medical or nursing personnel. To regulate and strengthen plaintiff's heartbeat, she also required Lanoxin daily if her apical pulse (pulse taken by listening to the heart with a stethoscope) dropped below a certain level.

According to Dr. Sharp, plaintiff's condition was such that she could not have been placed in an intermediate or custodial care facility; placement in a skilled nursing facility was necessary. Nevertheless, on August 13, 1985, defendants wrote that plaintiff's benefits would terminate as of May 31, 1985, on the ground that her care had become custodial. Some time later, however, after a letter from Dr. Sharp that plaintiff was in great need of convalescent, not custodial, care, benefits were reinstated.

Meanwhile, in mid-August, plaintiff was hospitalized again for five days after her blood sugar dropped sharply and she lost consciousness. When she was released, she returned to Hillhaven on her doctor's recommendation; she still needed skilled care. But on November 27, defendants advised plaintiff that she would receive no benefits after September 25, 1985, because she was receiving custodial rather than skilled nursing care. The decision was apparently based on the discontinuation of plaintiff's physical therapy, although physical therapy is not a service provided by nurses.

Miller wrote to Dr. Sharp asking for clarification of whether plaintiff needed skilled nursing care. Dr. Sharp's reply described the nursing services plaintiff was receiving, and concluded, "Hillhaven is a skilled nursing facility, but due to La Verne's chronic diabetes, this is no longer considered skilled nursing care." In her reply, however, Dr. Sharp was referring to Medicare requirements for skilled nursing benefits; Medicare does not pay skilled nursing care benefits when a patient's condition becomes chronic even though that patient continues to receive skilled nursing care. Plaintiff's policy contained no such restriction.

Miller altered Sharp's letter by making a copy with the last sentence deleted, and sent it to defendants. He then wrote to Sharp again, who eventually replied that registered nurses at Hillhaven were giving plaintiff prescribed amounts of insulin, monitoring her heart rate, and measuring her digitalis and electrolyte levels. Miller sent this letter to defendants, with a note insisting that the services being provided were not those of a custodial care facility. Defendants responded that their review indicated that plaintiff was no longer entitled to benefits.

In February 1986, Miller was appointed plaintiff's conservator. In March 1986, apparently after receiving a complaint from Miller, the California Department of Insurance asked defendants to reevaluate plaintiff's claim. After a review of plaintiff's medical records, Washington physician Dr. Carin Dugowson noted the discontinuation of physical therapy, and concluded that although plaintiff's need for care was "extensive," there was no evidence of ongoing skilled nursing care. In April 1986, Dr. Dugowson again reviewed plaintiff's records

and concluded her care was only custodial. A second physician who evaluated plaintiff's records for defendants reached a similar conclusion. Neither testified at trial, however, and there was no evidence of the definition of skilled nursing care utilized by those physicians.

Barbara McGuinley, a supervisor of nurses who monitor Medi-Cal patients in Alameda and Contra Costa County, testified that given plaintiff's condition, under Medi-Cal criteria she would be eligible for skilled nursing facility benefits and would not be admitted to an intermediate care facility.

DISCUSSION

a. *Special instruction on breach of the implied covenant*

We preface our discussion of defendants' contentions by emphasizing that they do not attack the jury's finding that they breached their insurance contract with plaintiff; in effect, they concede that the evidence is sufficient to support that finding.

Among the instructions given on breach of the implied covenant in this case was BAJI No. 12.92, which states that an insurance company which fails to deal fairly and in good faith with its insured by refusing unreasonably to pay for a valid claim covered by the policy is liable for damages proximately resulting from that conduct. The jury was also instructed that one test of whether defendants breached the covenant was whether an ordinary and prudent insurer desiring to treat its policy holders fairly and reasonably would have acted as did defendants.

Defendants rely on *Merlo v. Standard Life & Acc. Ins. Co.* (1976) 59 Cal.App.3d 5, and contend that despite those instructions, the court committed prejudicial error when it rejected the following special instruction: "An insurer has not breached the covenant of good faith and fair dealing if, when refusing to pay the claim of an insured, it has a reasonable belief that it has a legitimate defense to the payment of such claim."

In *Merlo*, the instructions requested and given were similar to those given in the instant case. The *Merlo* court commented, "In combination, these instructions come pretty close to the mark," and then suggested mildly, "Perhaps it would have been slightly more informative also to instruct that when an insurer refuses to pay the claim of its insured without a reasonable belief that it has a legitimate defense to the payment of such claim, such conduct constitutes a breach of the covenant of good faith and fair dealing." (*Merlo, supra*, 59 Cal.App.3d at p. 13.)

Plaintiff argues that the instruction proposed by defendants was properly rejected because it was stated in the negative, thereby erroneously describing a "blanket defense to liability," while the *Merlo* instruction affirmatively defines a breach of the insurer's duty. But we need not decide whether defendants' version of the *Merlo* instruction was fatally defective. Rejection of a requested instruction is prejudicial only where the omission has misled and confused the jury and it is reasonably probably that a result more favorable to the losing party would have been reached absent the error. (*Canavin* v. *Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 523-524.) Here the instructions given unequivocally informed the jury that only unreasonable conduct by defendants would

breach the implied covenant. In the *Merlo* court's words, therefore, the rejected instruction would have been only "slightly more informative" than the instructions given, and there is no reason to believe that a different verdict would have been reached had that instruction been given. The court's rejection of the instruction could not reasonably have affected the outcome.

b. *Special instruction on punitive damages*

Defendants also contend the court erred when it rejected the following special instruction: "Punitive damages are never awarded as a matter of right. They are not favored by the law, and they should be granted with the greatest of caution." Defendants urge that the instruction correctly stated the law and that without it, the jury had a "blank check and no guidelines" on punitive damages.

Our Supreme Court has described as a "universally recognized principle" that the law does not favor punitive damages and that they should be awarded with great caution. (*Dyna-Med, Inc.* v. *Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1392.) However, not all statements of the law found in opinions are appropriate as jury instructions, and the practice of indiscriminately transforming excerpts from opinions into instructions has frequently been criticized. (*Ernest W. Hahn, Inc.* v. *Sunshield Insulation Co.* (1977) 68 Cal.App.3d 1018, 1023; *Hsu* v. *Mt. Zion Hospital* (1968) 259 Cal.App.2d 562, 576; 7 Witkin, Cal. Procedure (3d ed. 1985) Trial, § 250, P. 255.)

The general principle stated in defendants' proposed instruction is codified in Civil Code section 3294, subdivision (a), which permits the award of exemplary damages

only when a defendant has been guilty of "oppression, fraud, or malice." (*Dyna-Med, Inc.* v. *Fair Employment & Housing Com., supra,* 43 Cal.3d at pp. 1391-1392.) Subdivision (c) of that section defines malice, fraud, and oppression. The jury was instructed in this case with BAJI No. 14.71 (1986 revision), which mirrored the language of section 3294 then in effect.[3] The jury received far more specific guidance from that detailed instruction than it would have from the broad policy statement articulated in defendants' proposed instruction. Defendants' instruction would only have confused or misled the jury and was properly rejected.

c. *Evidence of malice, fraud, or oppression*

Next, defendants contend that the award of punitive damages must be reversed because there was no substantial evidence of malice, oppression, or fraud by them. We disagree.

The oppression, fraud, or malice which justifies an award of punitive damages may be proved by circumstantial evidence. (*Neal* v. *Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 922-923 and fn. 6.) The following cases are illustrative. In *Moore* v. *American United Life Ins. Co.* (1984) 150 Cal.App.3d 610, an award of punitive damages was based on evidence that an insurer denied disability claims based on an overly restrictive and legally incorrect

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[3] The statutory definitions of fraud, malice, and oppression were modified when section 3294 was amended in 1987 but those modified definitions are inapplicable to the instant case. (See Stats. 1987, ch. 1498, § 5, No. 5 Deering's Adv. Legis. Service, p. 5930.)

definition of total disability, with knowledge that its definition was incorrect. (*Id.*, at pp. 637-640.) In *Richardson* v. *Employers Liab. Assur. Corp.* (1972) 25 Cal.App. 3d 232, malice was proved by evidence that an insurer had forced its insured to pursue a claim through arbitration and litigation despite knowledge that the claim was valid. (*Id.*, at pp. 244-245; disapproved on other grounds in *Gruenberg* v. *Aetna Ins. Co.* (1973) 9 Cal.3d 566, 580, fn. 10.) In *Nolen* v. *National Convenience Stores, Inc.* (1979) 95 Cal.App.3d 279, 287-288, the defendant's conscious disregard of the rights of others was established by the nature of its business operation.

In this case, after reviewing the record in the light most favorable to the judgment, we are satisfied that there is substantial evidence from which the jury might reasonably have concluded that defendants acted maliciously, in conscious disregard of plaintiff's rights. (See *Neal* v. *Farmers Ins. Exchange, supra,* 21 Cal.3d at pp. 922-923 and fn. 6.) For example, defendants terminated plaintiff's private duty nursing benefits based on a definition of "house confinement" which it acknowledged at trial was improper. Later, defendants denied benefits on the ground that plaintiff's care was custodial and not skilled, despite a letter from Dr. Sharp stating that plaintiff's need for a "full-time skilled nurse" to administer insulin injections. Although benefits were later reinstated, eventually defendants terminated plaintiff's benefits as of September 25, 1985, again on the ground that she was receiving only custodial care, despite their knowledge that plaintiff continued to need and receive daily insulin injections by licensed personnel. From these facts and all the evidence about defendants' course of

conduct throughout its dealings with plaintiff, the jury may reasonably have concluded that defendants were consistently attempting to deny plaintiff benefits without adequate investigation and in conscious disregard of her rights.

d. *Testimony of accountant Cropper*

James O'Hanlon, vice president of Great Republic Life Insurance Company in Washington, testified that the net worth of the two companies as of March 1987 was approximately $5,900,000, and that their combined net income for the first quarter of 1987 was approximately $45,000.

Certified public accountant Allen Cropper testified for plaintiff in rebuttal. Over defendants' objection that the testimony was irrelevant, Cropper testified that according to statements filed with California Department of Insurance, the most recent net worth of the California defendant, Great Republic Insurance Company, was about $5.6 million; its statutory income, exclusive of capital gains, was $2.8 million in 1985 and $1.25 million in 1986. He testified that the California company was the main asset of the Washington company. Over another relevancy objection, Cropper testified that the California company paid its parent company dividends of $714,000 in 1986, and $892,000 in 1987. He also estimated that the net worth of the company reflected in its statutory statement might well be $1 million less than that which would be reflected under generally accepted accounting principles.

Defendants contend that Cropper's testimony should not have been admitted because he "lacked the proper

foundational knowledge to present an accurate financial picture of the combined corporations . . . " but the argument is unsupported by any citation of authority.

Evidence with any tendency in reason to prove or disprove any material fact is relevant. Determining the strength or weakness of relevant evidence is matter for the jury. (*People* v. *Cordova* (1979) 97 Cal.App.3d 665-669.) Plaintiff's policy was issued by the California company and administered by the Washington company, and both were named as defendants in plaintiff's complaint. The California company was wholly owned by the Washington company and constituted at least 90 percent of the latter's assets. Under those circumstances, evidence of the net worth and net income of the California company and of the dividends which it paid to its parent company unquestionably had some tendency in reason to prove the net worth and income of the combined companies. The weight of that evidence was for the jury to decide. The evidence was properly admitted, and defendants cite no authority which suggests otherwise.

e. *Excessiveness of punitive damages*

Defendants next contend that the award of $500,000 in punitive damages was excessive as a matter of law. An appellate court may reverse an award of punitive damages only when it appears excessive as a matter of law or is so grossly disproportionate as to raise a presumption that it was the result of passion or prejudice. (*Neal* v. *Farmers Ins. Exchange, supra,* 21 Cal.3d at p. 928.) In examining the award, this court must consider the following factors: (1) the reprehensibility of defendants' conduct in light of the whole record; (2) defendants' wealth; and (3)

the ratio between the amount of compensatory and punitive damages. (*Ibid.*)

"The more reprehensible the act, the greater the appropriate punishment." (*Downy Savings & Loan Assn.* v. *Ohio Casualty Ins. Co.* (1987) 189 Cal.App.3d 1072, 1098.) We have already discussed in some detail defendants' malicious conduct and need not repeat that discussion here; the jury may well have concluded that conduct was particularly deserving of censure because of plaintiff's advanced age and frail condition.

Because the purpose of punitive damages is to punish wrongdoers and deter wrongful conduct, the wealth of the defendant must also be considered. (*Neal* v. *Farmers Ins. Exchange, supra,* 21 Cal.3d at p. 928 and fn. 13.) Some courts consider a defendant's net worth the best measure of its wealth for the purpose of assessing punitive damages. (*Downey Savings & Loan Assn.* v. *Ohio Casualty Ins. Co., supra,* 189 Cal.App.3d at p. 1100.) Net income may also be considered. (*Moore* v. *American United Life Ins. Co.* (1984) 150 Cal.App.3d 610, 641-642. The resolution of any conflict in the evidence on defendants' wealth is for the jury (*id.,* at p. 641), and there is no precise ratio between damages and net worth or net income which represents the only correct formula for an award. (*Devlin* v. *Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 391.)

In *Devlin* v. *Kearny Mesa AMC/Jeep/Renault, Inc., supra,* 155 Cal.App.3d 381, the court held that an award which represented 17.5 percent of defendant's net worth or almost 4 months net profit was not excessive as a matter of law. (*Id.,* at p. 391.) In *Goshgarian* v. *George* (1984) 161

Cal.App.3d 1214, the court upheld an award equalling about 10 percent of a defendant's net worth and commented that the figure was not "particularly shocking." (*Id.*, at p. 1228.) We cannot say that the $500,000 award here, which amounted to approximately 8.5 percent of defendants' combined net worth of $5.9 million, was excessive as a matter of law.

As for the relationship between punitive and compensatory damages, if damages are actually suffered as a result of a tortious act, punitive damages may be awarded even if the injured party is not awarded compensatory damages or is awarded only nominal damages. (*Carr* v. *Progressive Casualty Ins. Co.* (1984) 152 Cal.App.3d 881, 892.) Although an act of great reprehensibility may not justify a large award of punitive damages if the actual harm suffered is small (*Neal* v. *Farmers Ins. Exchange, supra,* 21 Cal.3d at p. 928), there is no absolute standard for measuring the proper ratio between punitive and compensatory damages. (*Downey Savings & Loan Assn.* v. *Ohio Casualty Ins. Co., supra,* 189 Cal.App.3d at p. 1097.) Plaintiff correctly states that courts have upheld awards with ratios ranging from 1:1 to 2,000:1. (See appendix to *Devlin* v. *Kearny Mesa AMC/Jeep/Renault, Inc., supra,* 155 Cal.App.3d at pp. 393-396.)

In this case the actual damages suffered by plaintiff as a result of defendants' tortious conduct included the $8,050 in attorney's fees which she incurred in obtaining the benefits due under the policy. (See *Brandt* v. *Superior Court* (1985) 37 Cal.3d 813, 817.) By stipulation of the parties, the judgment in plaintiff's favor included those fees. We do not consider the 62:1 ratio between the $500,000 in punitive damages and the $8,050 in actual

damages to be excessive as a matter of law. Thus we need not decide whether the $32,000 awarded plaintiff on her breach of contract claim should also be factored into that equation.

In summary, the award of punitive damages was not excessive as a matter of law. Defendants' attack on the constitutionality of punitive damages, raised for the first time on appeal, is without merit. (See *Toole* v. *Richardson-Merrell Inc.* (1967) 251 Cal.App.2d 689, 716-717.)

DISPOSITION

Judgment is affirmed.

Strankman, J.

We concur:

Barry-Deal, Acting P.J.

Merrill, J.

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 3, No. A040344

S008976

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

LA VERN CHEVAL, An Incompetent Person, etc.,
Respondent,

v.

GREAT REPUBLIC INSURANCE CO. et al., Appellants.

(Filed March 22, 1989)

Appellants' petition for review DENIED.

/s/ LUCAS
Chief Justice

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE FIRST APPELLATE DISTRICT
DIVISION: 3

Office of the County Clerk
Alameda County
1225 Fallon St.
Oakland, CA. 94612

CHEVAL, LAVERNE
vs.
GREAT REPUBLIC INSURANCE COMPANY, ET AL.
A040344
Alameda County No. 6193971

* * REMITTITUR * *

(Filed March 31, 1989)

I, RON D. BARROW, Clerk of the Court of Appeal of the State of California, for the First Appellate District, do hereby certify that the attached is a true and correct copy of the original opinion or decision entered in the above-entitled cause on January 5, 1989 and that this opinion or decision has now become final.

___Appellant ✔ Respondent to recover costs
___Each party to bear own costs
___Costs are not awarded in this proceeding
___See decision for costs determination

Witness my hand and the seal of the Court affixed at my office this MAR 29 1989

(SEAL)

RON D. BARROW, Clerk
By: C. TURNER/C. Turner
Deputy

Receipt of the original remittitur in the above case is hereby acknowledged.

Dated: APR 3 1989

County Clerk
By:
Deputy

1st Civil No.
A 040344

IN THE COURT OF APPEAL
FIRST APPELLATE DISTRICT
STATE OF CALIFORNIA

LaVERNE CHEVAL, by and through her Conservator, MARTIN MILLER,

Plaintiff/Respondent,

vs.

GREAT REPUBLIC INSURANCE COMPANY, GREAT REPUBLIC LIFE INSURANCE COMPANY,

Defendants/Appellants.

APPEAL FROM
SUPERIOR COURT OF ALAMEDA COUNTY
HON. WINSTON McKIBBEN, JUDGE

APPELLANT'S OPENING BRIEF

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VI

THERE EXIST CONSTITUTIONAL QUESTIONS CONCERNING THE VALIDITY OF PUNITIVE DAMAGES.

Defendants are cognizant of the fact that in *Toole v. Richardson-Merrell, Inc.* (1967) 251 Cal.App.2d 689, it was held that the imposition of punitive damages in a civil case does not violate any constitutional due process rights. Accordingly, defendants did not raise the issue of constitutionality of the jury's punitive damage award in the trial court. However, since the conclusion of the trial, herein, the United States Supreme Court has taken up the issue of the constitutionality of punitive damages in the case of *Bankers Life and Casualty Co. v. Crenshaw* (85-1765), which was argued before the Supreme Court in December, 1987. (See *California Lawyer* (April, 1988), "Are Punitive Damages an Endangered Species?", pp. 48-49.) Defendants request that this Court take judicial notice of the pending status of the *Bankers Life* case. Additionally, given the fact that the jury's verdict in this case on the issues of punitive damages was less than unanimous [R.T. 757:3-759:16], it is imperative that should this Court decide to rule against defendants' appeal on all other grounds, it should await the United States Supreme Court's imminent ruling on the constitutional issues in *Bankers Life* before making a final decision herein, as the decision in *Bankers Life* may we'l have enormous implications on the issues in this case.

No.

In The

SUPREME COURT OF CALIFORNIA

LaVERNE CHEVAL, By And Through Her Conservator, MARTIN MILLER,

Plaintiff and Respondent,

vs.

GREAT REPUBLIC INSURANCE COMPANY and GREAT REPUBLIC LIFE INSURANCE COMPANY,

Defendants and Appellants.

Appeal from the Superior Court for Alameda County, Winton McKibben, Judge.

PETITION FOR REVIEW

(Filed Feb 14, 1989)

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LaVERNE CHEVAL, By And Through Her Conservator, MARTIN MILLER,

Plaintiff and Respondent,

vs.

GREAT REPUBLIC INSURANCE COMPANY and GREAT REPUBLIC LIFE INSURANCE COMPANY,

Defendants and Appellants.

PETITION FOR REVIEW

ISSUES PRESENTED

1. Whether the punitive damage award in this case violates the due process clauses of the United States and California Constitutions (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7) because there is no legislatively-prescribed maximum limit for punitive damages and because the "no fixed standards" standard of BAJI No. 14.71 (7th ed. 1986) for determining the amount of a punitive award is unconstitutionally vague.

2. Whether the punitive damage award violates the due process clauses of the United States and California Constitutions and article I, section 16 of the California Constitution because, although penal in purpose and effect, it was rendered by a less-than-unanimous jury using only the preponderance-of-the-evidence proof standard.

3. Whether the punitive damage award violates the due process clauses of the United States and California Constitutions because, even assuming arguendo punitive damages are not sufficiently penal in purpose and effect to require a unanimous jury and proof beyond a reasonable doubt, due process requires proof by clear and convincing evidence.

4. Whether the punitive damage award is an excessive fine in violation of the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 17 of the California Constitution.

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§ 3294. [When permitted] (a) In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others.

(2) "Oppression" means subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the

defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to Section 377 of the Code of Civil Procedure or Section 573 of the Probate Code based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedant died instantly or survived the fatal injury for some period of time. The procedures for joinder and consolidation contained in Section 377 of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

Supreme Court, U.S.
FILED
JUN 2 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1784

In The

Supreme Court of the United States

October Term, 1988

GREAT REPUBLIC INSURANCE COMPANY and GREAT REPUBLIC LIFE INSURANCE COMPANY,

Petitioners,

vs.

La VERNE CHEVAL, By And Through Her Conservator, MARTIN MILLER,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI
STATEMENT OF THE CASE

The relevant facts are set forth in the opinion of the California Court of Appeal.[1] These facts show that petitioners are in the business of selling nursing home insurance. Petitioners sold a "SKILLED NURSING HOME INSURANCE" policy to respondent La Verne Cheval. The policy promises to pay the policyholder $40 for each day the policyholder is "necessarily and continuously" confined to a skilled nursing home, on the advice of a physician.

In January, 1985, Mrs. Cheval's doctor placed her in a skilled nursing home, following a fall that broke her hip. The broken hip was another step in the gradual deterioration of Mrs. Cheval's health that began when she suffered a stroke in 1983. In addition to the broken hip, she suffered from heart disease and advanced diabetes. The diabetes had left her legally blind. She was also deaf, incontinent of bowel and bladder, and unable to walk. She required constant observation by skilled nurses because she was a "brittle" diabetic, i.e., one who is subject to rapid changes in her blood sugar levels. A brittle diabetic in Mrs. Cheval's frail condition requires close observation because an undetected change in her blood sugar could be fatal. On top of all this, Mrs. Cheval received potentially toxic heart medication when her apical pulse (the heart beat as measured by a stethoscope) dropped below a certain rate. As Mrs. Cheval's doctor

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[1] That opinion is included in the Appendix to the Petition for Writ of Certiorari, at A-4 to A-18.

told petitioners on one occasion, the need for skilled nursing care would be obvious to petitioners if they ever saw Mrs. Cheval. They never did.

Incredibly, in August 1985 petitioners decided that Mrs. Cheval no longer required "skilled nursing care". Petitioners made this decision knowing full well that Mrs. Cheval was receiving the same nursing services that petitioners had up until that time considered skilled nursing care. This and other evidence showed that petitioners employed an ever-changing definition of skilled nursing care that became increasingly more restrictive as Mrs. Cheval's health deteriorated. As a result, treatment considered to be skilled nursing care in 1983 was no longer covered by the same policy in 1985.

At trial, California nursing home experts – including Mrs. Cheval's physician, the nursing director of the skilled nursing facility, and a representative of Medi-Cal, the state sponsored health insurance program – emphatically agreed that under California law Mrs. Cheval could not be admitted to any nursing home that provided anything less than skilled and continuous nursing care. *Petitioners never presented any contrary evidence.*

After a week long trial, the jury awarded Mrs. Cheval $32,200 in contract damages. The parties stipulated that the reasonable attorney's fees owed to her as a result of the bad faith denial of her insurance claim amounted to $8,050. The jury also awarded $500,000 in punitive damages, to punish petitioner for its fraudulent marketing of an insurance policy that promised far more than petitioners intended to deliver, and also to deter petitioners from handling in a similar manner any future claims from

the thousands of other people in California who had stored this insurance policy in a desk drawer or safety deposit box, intending to use it as a safety net when calamity struck.

REASONS FOR DENYING THE WRIT

I.

THE EIGHTH AMENDMENT ISSUE PRESENTED BY THE PETITION WAS NOT PRESSED AND PASSED UPON BELOW.

This Court has repeatedly held that it is without authority to review the decision of a state court unless it affirmatively appears that a Federal question was actually raised and actually decided. *Cardinale v. Lousiana*, 394 U.S. 437, 439 (1969). The reasons for this long-recognized rule are set forth in *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940):

> "In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to

consider any grounds of attack not raised or decided in that court."

Whether the failure to raise properly a federal question in state court is a jurisdictional defect or a prudential limitation on the exercise of jurisdiction appears to be an open question. *Illinois v. Gates*, 462 U.S. 213, 219-20 (1983); *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. ___, 108 S.Ct. 1645, 1651, 100 L.Ed.2d 62 (1988). In any event, the Eighth Amendment question cannot be considered by this Court because that question was neither raised in nor decided by the California Court of Appeal.

A. Petitioners Did Not Raise The Eighth Amendment Issue In The Court Of Appeal.

It is well-recognized that a bare reference to the "Constitution of the United States" is insufficient to raise a Federal question. *See, e.g., Herndon v. Georgia*, 295 U.S. 441, 442-43 (1935); *Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1897); *Bowe v. Stott*, 233 U.S. 658, 664-65 (1914).

Here, petitioners merely asked the Court of Appeal to defer its decision until this Court had issued its decision in *Bankers Life*. Petitioners' *entire* argument in the Court of Appeal on the constitutionality of punitive damages is set forth at page A-23 of the Appendix attached to the Petition. Petitioners did not challenge the California punitive damage statute on the basis of either the Fourteenth Amendment or the Eighth Amendment.[2] Instead,

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[2] California Civil Code sections 3294 and 3295 instruct when and how punitive damages may be awarded. The statute

(Continued on following page)

petitioners elected to let their constitutional challenge rise or fall with *Bankers Life*.

This Court issued its decision in *Bankers Life* on May 16, 1988, weeks before respondent filed her opposition to petitioners' opening brief in the Court of Appeal, and months before the Court of Appeal filed its decision on January 5, 1989. Petitioners' constitutional challenge to the punitive damages expired when this Court elected not to review the constitutionality of punitive damages in *Bankers Life*. At no time after *Bankers Life* was decided did petitioners recast or renew their constitutional argument. In fact, their 44 page reply brief in the Court of Appeal contains no mention of any constitutional issues. Similarly, petitioners never raised any constitutional issues during oral argument. It appears, therefore, that petitioners had no constitutional claim whatsoever before the Court of Appeal when the court issued its decision in January, 1985.

(Continued from previous page)

was amended after the jury verdict in this case. *See*, Cal. Stats. 1987, ch. 1498, §§ 5 and 6. The amended statutes provide that punitive damages may be awarded only upon "clear and convincing evidence" that a defendant has acted with malice, fraud or oppression, as those terms are defined by the statute. Cal. Civ. Code § 3294, subd. (a). In addition, evidence of a defendant's financial condition may not be introduced at trial until the jury has found the defendant guilty of malice, fraud or oppression. Cal. Civ. Code § 3295, subd. (d). The amendments address several of the issues raised by petitioners, rendering this case of interest only to the parties involved. This is another reason to deny the petition.

B. The Court Of Appeal Did Not Rule On The Eighth Amendment Question.

This Court has frequently stated that "when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969); *Webb v. Webb*, 451 U.S. 493, 495 (1981). Petitioners assert that the Court of Appeal resolved the Eighth Amendment issue in the court's one sentence statement that "[d]efendant's attack on the constitutionality of punitive damages, raised for the first time on appeal, is without merit." Petition, at 4. However, the case cited by the Court of Appeal, *Toole v. Richardson-Merrell Inc.*, 251 Cal.App.2d 689, at pages 716-17, (1967) makes no reference to the Eighth Amendment.

It is apparent that the Eighth Amendment issue petitioners now raise is a mere afterthought. It was never raised at trial, never mentioned on appeal. The parties never debated the merits of this argument. More importantly, there is no record that the California Court of Appeal decided this Federal question. It would be error to presume that it did.

II.

THIS CASE IS NOT SIMILAR TO *BROWNING-FERRIS INDUSTRIES.*

Petitioners assert the instant case is similar to *Browning-Ferris Industries v. Kelco Disposal, Inc., cert granted,* ___ U.S. ___, 109 S.Ct. 527, 102 L.Ed.2d 529 (1988). Petitioners

have asked this Court to hold the petition until a decision is reached in *Browning-Ferris*. Petition, at 28.

There are several differences between this case and *Browning-Ferris*. First, the damages are of a very different order of magnitude. *Browning-Ferris* involves actual damages of approximately $50,000 and punitive damages of $6 million. Here, the actual damages are $40,250 and the punitive damages are $500,000. Because the question of excessiveness is one of degree, the amount of the damages is necessarily relevant in determining whether constitutional boundaries (if any exist) have been exceeded. The damages in the instant case are not disproportionate to the actual harm suffered, and are not otherwise excessive.

Second, the conduct to be punished and deterred is qualitatively different. Petitioners and respondent in this case are not two competitors locked in a commercial dispute, as is the case in *Browning-Ferris*. Rather, respondent was a frail, elderly woman trying to collect insurance benefits she needed in order to pay for her nursing home care. It is utterly reprehensible for an insurance company, faced with such a claim, to invent a series of false excuses for not paying the claim, leaving the insured without the benefits she relied on to pay her medical bills. Both the trial court judge and the California Court of Appeal examined petitioners' conduct and found the damages awarded by the jury to be appropriate.

Third, the California punitive damage statute provides a completely different standard for awarding punitive damages than Vermont, the state where *Browning Ferris Industries* arose. California jury instructions provide

guidelines to assist the jurors in determining whether punitive damages should be awarded, and if so, in what amount. See, *Book of Approved Jury Instructions* (BAJI) No. 14.71 (7th ed. 1988 pocket pt.). Moreover, California has a well-developed body of case law that guides the trial court in ruling on a motion to remit the punitive damages. *See, e.g., Neal v. Farmers Ins. Exch.*, 21 Cal.3d 910, 927, 582 P.2d 980, 148 Cal.Rptr. 389 (1978).

The damages awarded in this case do not give cause for review by this Court, even if the Eighth Amendment issue had been properly preserved in the state court.

CONCLUSION

For the reasons stated above, respondent requests that the petition be denied.

Respectfully submitted,

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No. 88-1784

In The

Supreme Court of the United States

October Term, 1988

GREAT REPUBLIC INSURANCE COMPANY and GREAT REPUBLIC LIFE INSURANCE COMPANY,

Petitioners,

vs.

LaVERNE CHEVAL, By And Through Her Conservator, MARTIN MILLER,

Respondent.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

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R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice § 3.21, at 149-50 (6th ed. 1986) 2

INTRODUCTION

Respondent's opposition contains erroneous statements of fact and law. Contrary to respondent's contentions, Great Republic raised the constitutional challenge to punitive damages in the courts below, and the 1988 revision to California Civil Code section 3294 and California's standard jury instructions does not remedy the serious constitutional infirmities of California's punitive damage scheme.

I.

PETITIONERS PROPERLY RAISED THE CONSTITUTIONAL CHALLENGE TO PUNITIVE DAMAGES.

Respondent contends Great Republic did not properly raise below its constitutional challenge to California's punitive damage scheme. Opposition to Petition for Writ of Certiorari (hereinafter "Opposition") at 4-5. This is incorrect.

In Great Republic's Petition for Writ of Certiorari (hereinafter "Petition"), we observed the California Supreme Court has rejected constitutional attacks on punitive damages based upon due process arguments, thus making it futile for Great Republic to raise such issues in the trial court or court of appeal. *See* Petition at 1-2 n.1. The due process issues were therefore preserved by raising them in the petition for review to the California Supreme Court.[1]

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[1] Under *Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46 Cal. 3d 287, 292 n.1, 758 P.2d 58, 60 n.1, 250 Cal. Rptr. 116, 118 n.1 (1988), the California Supreme Court would have deemed it

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The California Supreme Court cases we cited, *see id.*, did not expressly address the Eighth Amendment issue. Nonetheless, Great Republic preserved the Eighth Amendment issue below.

This Court will consider federal claims *either* raised *or* considered and resolved by the appropriate state court below. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983); *see generally* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 3.21, at 149-50 (6th ed. 1986). The Eighth Amendment attack on punitive damages was explicitly raised in the California Supreme Court in Great Republic's petition for review. Petition app. at A-26. This Court has held that raising a federal question initially in the state's highest court is sufficient to preserve the question if state law does not consistently bar such procedure. *See Hathorn v. Lovorn*, 457 U.S. 255, 262-65 (1982) (cited in *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1650 (1988)); *Barr v. Columbia*, 378 U.S. 146, 149 (1964).

California law does not consistently bar this procedure. Rule 29(b)(1) of the California Rules of Court provides that "on petition for review the [California] Supreme Court *normally* will not consider: (1) any issue that could have been but was not timely raised in the briefs filed in the Court of Appeal" (emphasis added). This rule cannot be characterized as a consistent bar to

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(Continued from previous page)

futile to raise these issues in the court of appeal because the supreme court's decisions finding no due process violation are controlling.

raising an issue for the first time in the California Supreme Court. *See, e.g., Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1118, 751 P.2d 923, 932, 245 Cal. Rptr. 658, 667 (1988) ("Defendants respond that the issue is not properly before us, as it was not raised below (Cal. Rules of Court, rule 29), a contention we reject in light of the issue's great public importance"); *Tyre v. Aetna Life Ins. Co.*, 54 Cal. 2d 399, 405, 353 P.2d 725, 729, 6 Cal. Rptr. 13, 17 (1960) ("Defendant has been permitted to raise this issue for the first time in this court because the facts are not disputed and the issue merely raises a new question of law"). In fact, it is the general rule in California that appellate courts have discretion to consider a constitutional issue, presented on undisputed facts, raised for the first time on appeal. *See, e.g., Hale v. Morgan*, 22 Cal. 3d 388, 394, 584 P.2d 512, 516, 149 Cal. Rptr. 375, 379 (1978); *Flores v. Natividad Medical Center*, 192 Cal. App. 3d 1106, 1117-1118, 238 Cal. Rptr. 24, 30-31 (1987). Because the California Supreme Court had discretionary authority to hear the Eighth Amendment issue raised in Great Republic's petition for review, it cannot be said that the denial of the petition was a "silent application of a procedural bar." *Hathorn*, 457 U.S. at 263.

Evening assuming arguendo it was not sufficient to raise the Eighth Amendment issue for the first time in the California Supreme Court, the issue was raised in the California Court of Appeal as well. Great Republic requested that the court of appeal align its ruling with the upcoming decision in *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645. Petition app. at A-23. Appellants in *Bankers Life* raised both Eighth Amendment and due process issues. *See Bankers Life*, 108 S. Ct. at 1649-50.

Hence an Eighth Amendment ruling in that case would have bound the court of appeal in this case. The issue was clearly before the court of appeal.

The court of appeal in fact ruled on Great Republic's constitutional attack on punitive damages, citing *Toole v. Richardson-Merrell Inc.*, 251 Cal. App. 2d 689, 716-17, 60 Cal. Rptr. 398, 417-18 (1967), which held that constitutional guarantees applicable to criminal proceedings are not required in civil actions. Apparently, the court of appeal in this case interpreted *Toole* as rebutting Great Republic's Eighth Amendment as well as its due process attack on the punitive damage award.

Great Republic did not raise the Eighth Amendment issue in the trial court, but it was not necessary to do so in order to preserve the issue for review by the court of appeal. As discussed above, the court of appeal reached the issue on the merits even though it had not been raised in the trial court. Moreover, on February 26, 1987, the court of appeal, in *Downey Sav. & Loan Ass'n v. Ohio Casualty Ins. Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987), *cert. denied*, 108 S. Ct. 2023 (1988), expressly rejected an Eighth Amendment attack on California's punitive damage statute. *Id.* at 1100-01 ("Eighth Amendment applies only to criminal actions, not to purely civil penalties, as involved here"). The present case went to trial after *Downey Sav. & Loan Ass'n*, on July 27, 1987, Petition app. at A-1, and the trial court was therefore bound by the *Downey Sav. & Loan Ass'n* decision. *See Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455, 369 P.2d 937, 939-40, 20 Cal. Rptr. 321, 323-24 (1962). Hence it was pointless for Great Republic to raise the Eighth Amendment issue in the trial court. *See Moradi-Shalal v.*

Fireman's Fund Ins. Cos., 46 Cal. 3d at 292 n.1, 758 P.2d at 60 n.1, 250 Cal. Rptr. at 118 n.1.

In sum, Great Republic did everything necessary to preserve the Eighth Amendment issue for review in this Court.

II.

RESPONDENT MISCHARACTERIZED THE CURRENT STATE OF CALIFORNIA'S PUNITIVE DAMAGE LAW.

Respondent implies that the 1988 revision to California standard jury instruction, Book of Approved Jury Instructions (BAJI) No. 14.71 (7th ed. 1988 supp.) remedied the constitutional infirmities articulated by Great Republic in its petition. Opposition at 7-8. Not so.

As was stated in the petition for certiorari, revised BAJI No. 14.71 retains the constitutional inadequacies of its 1986 predecessor. Petition at 14-18. For the Court's convenience we have attached at App., A-1 the text of both BAJI No. 14.71 (7th Ed. 1986), which was given to the jury in this case, and BAJI No. 14.71 (7th ed. 1988 supp.). A comparison of the two instructions makes clear the inaccuracy of respondent's implication that the revised instruction has corrected the constitutional failings of its predecessor.[2]

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[2] Although the 1988 revision to BAJI 14.71 does change the burden of proof to "clear and convincing evidence," it does not address the other constitutional deficiencies in California's punitive damage law: the lack of a "beyond a reasonable doubt" proof standard, the lack of a legislatively-prescribed statutory maximum, and the lack of any meaningful standards governing a jury's determination of the amount of a punitive award. It likewise does not remedy the Eighth Amendment problem.

Respondent also suggests amended Civil Code section 3294, effective January 1, 1988, remedies all the constitutional problems. This again is incorrect, for the same reasons stated above with regard to the revision of BAJI No. 14.71. It was the amendment to section 3294 that resulted in the revision of BAJI No. 14.71. (For the Court's convenience we have attached the text of the revised section 3294 at App., A-5.)[3]

Respondent is wrong that this case is "of interest only to the parties involved." Opposition at 5 n.2. It is of great interest to all California defendants with punitive damage claims pending, and, for that matter, all such defendants across the nation. We urge that a writ of certiorari be granted.

Respectfuly submitted,

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[3] The text of former section 3294 was attached to the petition at App., A-27.

APPENDIX

BAJI 14.71 (1986)

PUNITIVE DAMAGES – RECOVERY OF AND MEASURE

If you find that plaintiff suffered damage as a [proximate] [legal] result of the conduct of the defendant on which you base a finding of liability, you may then consider whether you should award punitive damages against defendant [___ only], for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by a preponderance of the evidence that said defendant was guilty of [oppression] [fraud] [or] [malice] in the conduct on which you base your finding of liability.

["Malice" means conduct which is [intended by the defendant to cause injury to the plaintiff] [or] [carried on by the defendant with a conscious disregard for the] [rights] [or] [safety] of others.] [A person acts with conscious disregard of the rights or safety of others when [he] [she] is aware of the probable dangerous consequences of [his] [her] conduct and willfully and deliberately fails to avoid those consequences.]

["Oppression" means subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.]

["Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.]

The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount

to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following:

(1) The reprehensibility of the conduct of the defendant,

(2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition,

(3) That the punitive damages must bear a reasonable relation to the actual damages.

If you find that plaintiff is entitled to an award of punitive damages against defendant, you shall state the amount of punitive damages separately in your verdict.

BAJI 14.71 (1988 Revision)

PUNITIVE DAMAGES – RECOVERY OF AND MEASURE – TRIAL NOT BIFURCATED

If you find that plaintiff suffered damage as a [proximate] [legal] result of the conduct of the defendant on which you base a finding of liability, you may then consider whether you should award punitive damages against defendant [___ only], for the sake of example and by way of punishment. You may in your discretion award such damages, if, but only if, you find by clear and convincing evidence that said defendant was guilty of

[oppression] [fraud] [or] [malice] in the conduct on which you base your finding of liability.

["Malice" means conduct which is [intended by the defendant to cause injury to the plaintiff] [or] [despicable conduct which is carried on by the defendant with a willful and conscious disregard for the [rights] [or] [safety] of others.] [A person acts with conscious disregard of the rights or safety of others when [he] [she] is aware of the probable dangerous consequences of [his] [her] conduct and willfully and deliberately fails to avoid those consequences.]

["Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.]

["Despicable conduct" is conduct which is so [vile,] [base,] [contemptible,] [miserable,] [wretched,] [or] [loathsome] that it would be looked down upon and despised by ordinary decent people.]

["Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.]

The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following:

(1) The reprehensibility of the conduct of the defendant.

(2) The amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition,

[(3) The amount of actual damages.]

If you find that plaintiff is entitled to an award of punitive damages against defendant, you shall state the amount of punitive damages separately in your verdict.

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§ 3294. Exemplary damages; when allowable; definitions

(a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

(b) An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

(d) Damages may be recovered pursuant to this section in an action pursuant to Section 377 of the Code of Civil Procedure or Section 573 of the Probate Code based upon a death which resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time. The procedures for joinder and consolidation contained in Section 377 of the Code of Civil Procedure shall apply to prevent multiple recoveries of punitive or exemplary damages based upon the same wrongful act.

(e) The amendments to this section made by *Chapter 1498 of the Statutes of 1987* apply to all actions in which the initial trial has not commenced prior to January 1, 1988.